

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUVENTINO SOLIS)	
Claimant)	
VS.)	
)	Docket Nos. 190,678 & 220,773
BROOKOVER RANCH FEEDYARD, INC.)	
Respondent)	
)	
AND)	
)	
UNITED STATES FIDELITY & GUARANTY CO.)	
Insurance Carrier)	
)	
AND)	
)	
KANSAS LIVESTOCK ASSOCIATION)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier, United States Fidelity & Guaranty Company, appealed Assistant Director David A. Shufelt's July 6, 1998, Award.

APPEARANCES

The claimant appeared by his attorney, Robert A. Levy of Garden City, Kansas. The respondent and United States Fidelity & Guaranty Co. (USF&G) appeared by their attorney, Billy E. Newman of Topeka, Kansas. The respondent and its insurance carrier, Kansas Livestock Association appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

Administrative Law Judge Kenneth S. Johnson consolidated these two docketed claims for litigation purposes after a hearing held on January 6, 1998. In the first docketed claim No. 190,678, it is undisputed that on August 31, 1993, claimant caught his left hand in a flaker machine while working at respondent's feed mill. As a result of that work-related accident, claimant suffered an amputation of all of his fingers on his left hand. Respondent provided medical treatment for claimant's amputation, and after the injury healed, the respondent provided claimant with a clip prosthesis and a silicone glove prosthesis. Claimant returned to work for the respondent in an accommodated job as a feed truck driver.

The Assistant Director awarded claimant a 70 percent permanent partial disability of the left hand based on the uncontradicted testimony of J. Mark Melhorn, M.D. The Assistant Director also awarded a healing period equal to the time claimant was off work of 6.71 weeks as provided for in K.S.A. 44-510d(b).

At the time of claimant's August 31, 1993, accident, respondent was insured by USF&G. Respondent and USF&G have not appealed and do not dispute the Assistant Director's Award for a 70 percent permanent partial disability of the left hand. The dispute in this matter relates to the repair and/or replacement of the prosthesis and whether claimant needs more than one silicone glove prosthesis.

The Assistant Director found respondent and USF&G responsible for the repair or replacement of the silicone glove prosthesis. Additionally, the Assistant Director found claimant was entitled to a second silicone glove prosthesis for use when the original glove prosthesis is being repaired.

In Docket No. 220,773, claimant's Application for Hearing alleged the date of accident to be January 16, 1997, but at the regular hearing, the date of accident was alleged to be from May 4, 1995, through December 6, 1997. The Assistant Director denied this claim finding there was no second accidental injury, no timely notice, and no timely written claim.

Respondent and USF&G contend that claimant's work activities, after he started using the silicone glove prosthesis in 1995 at work, are the reason the silicone glove prosthesis is in need of repair. Therefore, respondent and USF&G contend K.A.R. 51-9-2 requires the silicone glove prosthesis be repaired or replaced as a medical expense under the new claim filed and docketed as No. 220, 773. In Docket No. 220,773, claimant claims, after he returned to work for respondent, his regular work activities caused his silicone glove prosthesis to become worn and finally in need of repair.

Respondent and USF&G, in their appeal brief, raised for the first time constitutional equal protection, discrimination, and public policy arguments. The Appeals Board has found on other occasions that issues raised for the first time on appeal are in contravention of K.S.A. 1997 Supp. 44-555c and will not be considered by the Appeals Board. See Fisher v. Quaker Oats Company, Docket No. 190,499 (February 1998).

Claimant argues that the Assistant Director's Award should be affirmed. Claimant contends the respondent and USF&G are required to provide, pursuant to K.S.A. 44-510(a), medical treatment as is reasonably necessary to cure and relieve the employee from the effects of the injury. Claimant contends that providing claimant with a prosthesis plus the repair and replacement of the prosthesis constitutes reasonable and necessary medical treatment. Claimant further argues that K.A.R. 51-9-2 only applies when the employee is already wearing the prosthesis and it is destroyed by a work-related accident. Accordingly, the claimant contends the provisions of K.A.R. 51-9-2 do not apply to this case because claimant's need for the prosthesis directly flows from his work-related amputation accident and not from a subsequent incident. Therefore, since USF&G had respondent's workers compensation insurance coverage at that time, it is responsible for any further repair or replacement of the prosthesis.

On appeal, claimant also contends the respondent and its insurance carrier USF&G's application for review was filed out of time and should be dismissed. Furthermore, the respondent's insurance carrier USF&G contend that only Docket No. 190,678 was appealed, and since Kansas Livestock Association is not a party in that docketed case, it has no standing to argue the issues related to Docket No. 190,678.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

Docket No. 190,678

The Appeals Board must first address claimant's contention that the respondent and USF&G filed its application for review before the Appeals Board out of time and, therefore, the appeal should be dismissed.

The July 6, 1998, Award is subject to review by the Appeals Board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays, and legal holidays shall be excluded in the time computation. See K.S.A. 1997 Supp. 44-551(b)(1). The effective date of the Award shall be the day following the date noted thereon by the administrative law judge. Applications for review by the Appeals Board shall be considered as timely filed only if received in the central office or in one of the district offices of the Division of Workers Compensation on or before the 10th day after the effective date of the Award of the administrative law judge. See K.A.R. 51-18-2.

The effective date of the Award was July 7, 1998. The day after the effective date was July 8, 1998, and 10 days thereafter, excluding Saturdays and Sundays, was July 21, 1998. Since the application for review was received in the central office of the Division of Workers Compensation on July 20, 1998, the application for review was timely filed.

Respondent and USF&G further contend that Docket No. 190,678 with a date of accident of August 31, 1993, was the only docket number appealed. Accordingly, they argue the insurance carrier having coverage in Docket No. 220,773, Kansas Livestock Association, is not an interested party and has no standing to argue the disputed issues in Docket No. 190,678.

When multiple docket numbered cases have been consolidated by the Administrative Law Judge for the purpose of litigation and award, the Appeals Board has held that all docketed claims remain consolidated for purposes of Appeals Board review. See Carmen v. Best Buy, Docket Nos. 202,586, 204,207 & 210,069 (October 1997). Therefore, the Appeals Board finds the issues involving Docket No. 220,773 are before the Appeals Board for review. In fact, USF&G's principal argument is that claimant's need for repair and replacement of the silicone glove prosthesis is the result of a new accident that is alleged to have occurred in Docket No. 220,773 at the time Kansas Livestock Association had insurance coverage.

In Docket No. 190,678, the Assistant Director found the respondent and USF&G had the duty and responsibility to maintain, repair, and replace the prosthesis device for claimant's injured left hand. The Assistant Director further found that the respondent and USF&G were responsible to provide the claimant with two prosthesis devices because the record established the prosthesis device would require periodic return to the manufacturer for maintenance or repair. During that time, claimant would not be able to function either in his daily living activities or at work without the prosthesis device.

The Appeals Board finds the Award entered by Assistant Director in Docket No. 190,678, should be affirmed. The findings of fact and conclusions of law as set forth in the Assistant Director's Award are found to be accurate and are hereby adopted by the Appeals Board as its own as if specifically set forth herein.

K.S.A. 44-510(a) imposes a duty on the employer to provide the injured worker with a prosthesis device or other apparatus reasonably necessary to cure and relieve the employee from the effects of his injury. The Appeals Board specifically finds when a work-related injury results in the need for a prosthesis device being provided the injured worker, then the employer is responsible for maintenance, repair, and replacement of the prosthesis device regardless of whether the device wears out from use at work or elsewhere.

Docket No. 220,773

The Assistant Director found claimant's need for repair of the silicone glove prosthesis was not a result of a second accidental injury. In addition, the Assistant Director found the claimant had not met his burden of proof to establish a second accidental injury. The Assistant Director concluded, since there was no second accidental injury, the repair of the silicone glove prosthesis was the responsibility of respondent and USF&G in Docket

No. 190,678. The Assistant Director further found that the claimant had failed to establish that he gave timely notice and timely written claim of the accident.

The Assistant Director's denial of compensation benefits in Docket No. 220,773 should be affirmed. The Appeals Board concludes that there was no second accidental injury and, further, claimant failed to establish he gave timely notice and timely written claim of the accident.

AWARD

Docket No. 190,678

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Assistant Director David A. Shufelt's July 6, 1998, Award should be, and the same is hereby, affirmed in all respects.

AWARD

Docket No. 220,773

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Assistant Director David A. Shufelt's July 6, 1998, Award should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert A. Levy, Garden City, KS
Billy E. Newman, Topeka, KS
D. Shane Bangerter, Dodge City, KS
David A. Shufelt, Assistant Director
Philip S. Harness, Director